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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT PARRATT, WARDEN OF THE NEBRASKA STATE PENITENTIARY,

Petitioner,

vs.

RICHARD DEAN HOLTAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1100 Farm Credit Building
Omaha, NE 68102
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QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court erroneously apply this Court's ruling in Engle vs. Isaac, _____ U.S. _____, 102 S. Ct. 1588 (1982)?

2. Is the opinion of the Circuit Court inconsistent with Sumner vs. Mata 449 U.S. 539 (1981)?

OPINIONS DELIVERED BY THE COURTS BELOW

The respondent accepts the opinions enumerated by petitioner.

GROUNDS FOR JURISDICTION

The Attorney General for Nebraska invokes 28 U.S.C., Section 2254 forthis Court's jurisdiction. Section 2254 does not give this Court any jurisdiction and is clearly inapplicable as far as conferring jurisdiction is concerned.

———o———

STATEMENT OF THE CASE

The respondent accepts petitioner's statement of the case except respondent denies that Issue I (e) (as it is referred to in petitioner's Petition For Writ of Certiorari) was not assigned as error on his post conviction appeal to the Supreme Court of Nebraska.

———o———

ARGUMENT

I.

The Circuit Court did not erroneously apply this Court's ruling in Engle vs. Issac, _____ U.S. _____, 102 S. Ct. 1588 (1982).

Engle vs. Isaac, _____ U.S. _____, 102 S. Ct. 1588 (1982) has no application to this case since it concerns state prisoners who bring constitutional claims to the federal courts through 28

U.S.C. 2254 petitions after a state procedural default. There was no procedural default in the state courts despite the language of Judge Urbom on page 5 of his memorandum.

APPENDIX C, App. 37 of petitioner's petition for a writ of certiorari, contains the opinion of the Supreme Court of Nebraska. The second paragraph of that opinion states:

> " . . . By amended motion to vacate, the defendant maintains that his conviction was invalid for a number of reasons which are more particularly set out in the amended motion to vacate. They may, however, be grouped together and will be so discussed herein. They fall into the following general categories: (1) The inadequacy of trial counsel; (2) . . . . . "

The Supreme Court then went on to discuss the claims set out in the amended motion to vacate. It came to the claim of ineffective assistance of counsel (App 43 of petitioner's petition) and noted that respondent maintained that "inadequacy of counsel is displayed in a series of ways". It then discussed some of these claims of ineffective assistance of counsel but failed to address the argument that failure to advise the Court that respondent wished to withdraw his plea of no contest to the charge of first degree murder after he had been advised by counsel that the penalty which the Court would probably impose upon him was a sentence of death, was a violation of respondent's right to effective assistance of counsel.

In Nebraska, as petitioner points out in his petition, consideration of an issue on appeal is limited to errors assigned and discussed in the brief of appellant. Holtan's brief assigned as error the overruling of his amended motion to vacate and finding that his counsel was effective. It also assigned as

error the failure of the district court to decide the questions presented in paragraphs two - twelve, inclusive, of the amended motion to vacate. Paragraphs two - twelve consisted of arguments that the trial court should have ordered a psychiatric examination of Holtan prior to accepting his plea; that the death penalty violated the constitutional rights of Holtan as more particularly set out in various paragraphs of the motion to vacate; that Nebraska's death penalty is unconstitutional, and that a state law enacted after the sentence was imposed in this case should have been applied to Holtan. Other arguments were contained in paragraphs two - twelve, but these were the only ones addressed by the Court despite the fact that they were argued in Holtan's brief.

In the petitioner's brief to the Nebraska Supreme Court he concedes that Holtan made no procedural defaults in his assignment of errors. In his STATEMENT OF FACTS, petitioner writes:

> " . . . In his Amended Motion to Vacate and Set Aside, the appellant raised 12 separate issues (T 58-63). The denial of the motion by the district court addressed only the issue of competency of counsel; the court apparently viewing the appellant's other complaints as being without merit (T 66-69). On this appeal, the appellant renews his claims as to all the issues raised by his Amended Motion to Vacate. However, appellant's primary contention seems to be that he was denied effective assistance of counsel." (Emphasis added). p. 6 appellee's brief.

Holtan's amended motion to vacate raised the issue (referred to by petitioner as Issue I e) which petitioner now claims was never presented to the Nebraska Supreme Court.

On p. 6 of petitioner's petition he writes that "Holtan conceded in his brief before the Court of Appeals on this question that 'there is no specific discussion' of Issue I (e)

in his state court appellate brief." This is simply not true. How can petitioner say there was no specific discussion of this issue and then turn around on pages 3 & 4 of his petition and say . . . "The only allusion of Issue I (e) in Holtan's post conviction appeal was the following three sentences contained in the body of a broader argument:

> Prior to sentencing, appellant asked Carey to withdraw his plea. Carey did not deny at the evidentiary hearing, that his client had made the request. His testimony was that he didn't recall the incident."

As a matter of fact there was more to the discussion. Holtan had written two more sentences on this subject. He had added the following:

> His failure to recall this and other important matters prompted the District Court to comment that it was disappointed at his poor memory. Certainly no one was more disappointed than appellant.

Whether this discussion was brief or not is immaterial. The fact is that the issue was discussed, as the Supreme Court of Nebraska requires, and thus there was no procedural default. Holtan presented the full substance of his ineffective assistance claim to the state courts in a timely and proper fashion.

Assuming, arguendo, that Engle did apply, the Circuit Court of Appeals could still have granted the relief it did due to this Court's reaffirmation of Wainwright vs. Sykes, 433 U.S. 72 (1977). In Sykes, the Court stated that its cause-and-prejudice standard would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of

a miscarriage of justice." 433 U.S. at 91. In Engle the Court held that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard. pp. 26-27.

———o———

ARGUMENT

II.

The opinion of the Circuit Court is not inconsistent with Sumner vs. Mata.

Petitioner attempts to bring Sumner into play on the ground that the Court of Appeals overturned findings of fact implicit in the Supreme Court of Nebraska's denial of post conviction relief. The finding of fact implicit in the ruling, according to petitioner's argument, is that the failure to move to withdraw the plea was not a breach of duty by Holtan's attorney.

Judge Urbom, the Chief United States District Court Judge for Nebraska, specifically found in his memorandum decision that Holtan's attorney breached his duty by failing to attempt to have the plea withdrawn (App. 26 of petitioner's petition). Petitioner accepted this finding during oral argument before the Circuit Court. Additionally, petitioner wrote, on p. 1 of his brief to the Circuit Court, "We accept Judge Urbom's Memorandum Decision as an accurate reflection of the facts in this case." The conclusion of Judge Urbom that Holtan's attorney was asked to withdraw the plea and refused to do so was a factual determination. How can petitioner complain now, for the first time, that the Court of Appeals is overturning a fact implicit in the Nebraska Supreme Court's denial of relief, when the Court of Appeals is simply agreeing with the federal district court's

finding, which the petitioner himself agreed with before the opinion of the Circuit Court of Appeals had been issued?

The Court of Appeals agreed with Judge Urbom in every respect, and there was no violation of this Court's holding in Sumner vs. Mata. The conclusion by the Circuit Court concerning prejudice did not involve a factual determination by the Nebraska Supreme Court, since that court never addressed the argument.

CONCLUSION

The opinion by the Court of Appeals was unanimous. It was well written by a respected jurist in the twi-light of a distinguished career. It is evident from the depth of the Circuit Court's research that no dust has gathered on the law books in its library. Its opinion in this case adhered to the law in all respects and should be upheld.

RICHARD DEAN HOLTAN, Respondent

By _____

J. William Gallup
1100 Farm Credit Building
Omaha, NE 68102
(402) 422-0800

APPENDIX A

IN THE SUPREME COURT OF NEBRASKA

No. 42452

State of Nebraska,

Appellee,

vs.

Richard Dean Holtan,

Appellant.

Appeal from the District Court
of Douglas County, Nebraska

Brief of Appellee
(Petitioner in this Court)

Statement of Facts, pages 5 and 6 from Petitioner's Brief to the Nebraska Supreme Court.

STATEMENT OF FACTS

The appellant brings this appeal from the district court's denial of his motion for post conviction relief (T66, 70). This statement of facts is limited only to items relevant to issues raised in this post conviction proceeding.

Appellant was charged with first degree murder while in the commission of a crime and with shooting with intent to kill, wound, or maim (T1-2). The Douglas County District Court appointed the Public Defender to represent the appellant (T6). On December 4, 1975, the appellant entered a plea of no contest to each count and was found guilty as to each charge. On February 9, 1976, a three-judge panel entered an order sentencing the appellant to death in the electric chair (T16-28).

In his Amended Motion to Vacate and Set Aside, the appellant

raised 12 separate issues (T58-63). The denial of the motion by the district court addressed only the issue of competency of counsel; the court apparently viewing the appellant's other complaints as being without merit (T66-69). On this appeal, the appellant renews his claim as to all the issues raised by his Amended Motion to Vacate. However, appellant's primary contention seems to be that he was denied effective assistance of counsel. Most of the facts related here concern this latter issue.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2153

RICHARD DEAN HOLTAN,

Appellant,

vs.

ROBERT F. PARRATT, Warden of the Nebraska Penal and Correctional Complex,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Brief of Appellee

Statement of Facts, page 1 of Petitioner's Brief in the Eighth Circuit.

STATEMENT OF FACTS

While appellant has presented the facts as he testified to them, several of the statements which are labeled "fact" in appellant's brief were the subject of dispute before the state district and Supreme Courts and have now been resolved against Holtan on three occasions. We accept Judge Urbom's Memorandum Decision as an accurate reflection of the facts in this case.

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October Term, 1982

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Petitioner,

vs.

RICHARD DEAN HOLTAN,

Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Respondent, Richard Dean Holtan, by and through his attorney, asks leave to proceed in forma pauperis pursuant to Rule 53.

The Affidavit of Respondent's counsel in support of this motion is attached hereto.

RICHARD DEAN HOLTAN, Respondent,

1/

By J. William Gallup

J. William Gallup
1100 Farm Credit Building
Omaha, NE 68102
(402) 422-0800
Attorney for Respondent

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT F. PARRATT, Warden,

Petitioner,

vs.

RICHARD DEAN HOLTAN,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NEBRASKA)
)ss.
COUNTY OF DOUGLAS)

I, J. William Gallup, being first duly sworn according to law, depose and say in support of Richard Dean Holtan's Motion for Leave to Proceed in Forma Pauperis:

1. I am the court-appointed attorney for the Respondent.

2. That I was appointed by the United States District Court to represent Mr. Holtan in the United States District Court, and I was later appointed by the Circuit Court of Appeals to represent Mr. Holtan in that Court.

3. That Richard Dean Holtan is without funds to pay the costs of printing a response to Petitioner's brief.

4. That Richard Dean Holtan is indigent to my knowledge and has been adjudged indigent by both the United States District Court

and the Circuit Court of Appeals.

5. That attached to this Affidavit and incorporated by reference is a letter to affiant from the Circuit Court of Appeals.

J. William Gallup

SUBSCRIBED and sworn to before me this 17 day of November, 1982.

GENERAL NOTARY - State of Nebraska
GERALYN M. PRIBYL
My Comm. Exp. Oct. 9, 1985

Notary Public

United States Court of Appeals
For The Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

Telephone Number
425-5600
Area Code 314

July 28, 1982

Mr. J. William Gallup
Attorney at Law
1100 Farm Credit Building
Omaha, Nebraska 68102

Re: No. 81-2153. Richard Dean Holtan v. Robert Parratt, Warden of Nebraska Penal and Correctional Complex.

Dear Mr. Gallup:

Enclosed please find your CJA Form 20, Voucher No. 683613, which you submitted in the above-styled case. The Court's policy does not permit the processing of CJA vouchers prior to the issuance of this Court's mandate. The reason for this policy is to enable you to claim time expended in the possible filing of a motion for rehearing and/or a petition for a writ of certiorari.

Since your claim is in excess of the statutory limit of $250 plus expenses for this state habeas corpus appeal a justification statement is required if you want the Court to consider your voucher for the full amount claimed. Copies of your air fare and hotel receipts are also required. Your attention is also directed to the "Certifications of Attorney/ Payee" box. Please make sure all appropriate questions are answered.

Please submit your voucher and supporting statements after this Court's mandate is issued. If you have any questions concerning the Court's policies, please contact me.

Sincerely,

Linda A. Dahm

Linda A. Dahm
Administrative Assistant

/ld

enclosure